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IBRAHIM BAKAR

v.

SEAH AH HAN & ORS.

HIGH COURT MALAYA, PENANG

EDGAR JOSEPH JR J

b

[CIVIL SUIT NO. 25-504-81]

29 FEBRUARY 1992

CIVIL PROCEDURE: *Cost - Claim for costs on the Subordinate Court scale - Item of costs being witness fee paid - Question at issue - Whether full reimbursement or partial reimbursement to be allowed.*

c

DAMAGES: *Quantum - Discretion of the court - Issue of quantum for qualifying to give evidence - Disputed - Whether special reasons to apply - No hard and fast rule - Onus - Upon plaintiff to demonstrate special reasons for discretion to be exercised.*

EVIDENCE: *Witnesses - Specialist - Consultant orthopaedic surgeon - Fee allowable in respect of attendance and fee for qualifying to give evidence as experts - Although no evidence was actually given at the material time.*

d

In the High Court at Penang the plaintiff had obtained judgment for RM15,000 being general damages for personal injuries and RM2,327.40 being special damages and interest on both those sums together with costs on the Subordinate Court scale.

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When the solicitors' for the plaintiff submitted the draft order to the solicitors for the defendants for approval the latter deleted a number of items of costs claimed but only two of these now call for consideration, namely, item 22 being witness of RM1,000 fee paid to consultant orthopaedic surgeon and item 20 being RM500 witness fee paid to another consultant orthopaedic surgeon.

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The question at issue that was raised at the learned Judge's chambers for decision was whether the plaintiff was entitled to be fully reimbursed in respect of the two sums aforesaid or were they only entitled to partial reimbursement and that too limited to the amount prescribed by Appendix 2 to O. 48 r. 56 of the Subordinate Court Rules 1980.

After hearing Counsel on both sides, the learned Judge decided this question in favour of the defendants and also granted the plaintiff's request for further argument in open Court when the matter was more fully argued.

*g***Held:**

[1] The learned Judge took the view that the provisions pertinent to the circumstances of this case are those of O. 48 r. 57. It is clear that the two specialists concerned were expert witnesses whose attendance was required by the plaintiff to give evidence as to his residual disabilities which were the direct result of the injuries he had sustained in the collision.

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[2] Therefore, by r. 57(1) a fee was allowable in respect of their attendance in Court and in addition, a fee for qualifying to give evidence as experts was also allowable because although they did not give evidence, r. 57(4) expressly provides that the Court may, if it thinks just allow the fee for qualifying to give evidence, notwithstanding that the expert witness does not attend the trial. The learned Judge exercised his discretion in favour of the plaintiff in respect of both categories of fee.

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[3] As to the quantum of the fees, there appeared to be no dispute concerning the claim fees in respect of the attendance in Court resulting in loss of time. However the quantum of fees for qualifying to give evidence was fiercely disputed.

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[4] Counsel for the plaintiff had contended that although generally by r. 57(3) the maximum permissible fee for qualifying to give evidence was fixed at RM200, the provisions of the proviso thereto empowered the Court, if satisfied that there were special reasons to do so, allow such a fee in excess of RM200 with this proposition the Court agreed.

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[5] With regards to the question at issue whether the plaintiff has satisfied the Court of the existence of special reasons to justify the application of the provisions of the proviso in his favour, the learned Judge took the view that a Court should not be bound by any rigid rule defining "special reason".

[6] However it was distinctly held that the party seeking the exercise of the Court's discretion under the provisions of the proviso, must demonstrate that there are facts peculiar to the particular case which set it apart from others.

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[7] The Court do not wish to lay down any hard and fast rule and the best approach would appear to be to decide each case according to its merits always keeping in mind that the onus is upon the plaintiff to demonstrate special reasons for the discretion to be exercised in his favour.

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[8] It was urged that the discretion of the Court should be exercised in favour of the plaintiff. The learned Judge observed that the question at issue was whether the plaintiff had demonstrated special reasons within the meaning of the provisions of the proviso. The learned Judge was unable to detect facts peculiar to the particular case which set it apart from the countless other running down cases where medical specialist are called. To hold otherwise would amount to indulging human sympathies in disregard of duty to do justice according to law. It would also be creating a dangerous precedent.

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[9] The learned Judge by way of post script added that the correct procedure for a successful plaintiff to adopt if he desires the Court to exercise its discretion in his favour under the provisions of the proviso, is to ask for an order that those provisions be invoked and to support it with reasons sufficient to convince a legal mind that there are special reasons for the exercise of the discretion in his favour.

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[10] The stage at which this should be done is as soon as judgment is pronounced in the trial Court, so that if the matter goes on appeal and issue of costs is reopened the High Court will have the advantage of the view of the Court below. Failure to do this would normally result in the High Court refusing to entertain arguments on the question concerned.

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[Plaintiff entitled to partial reimbursement only that is RM100 fee for attending Court as compensation for loss of time, RM200 for qualifying to give evidence in respect of each witness.]

Legislation referred to:

Subordinate Court Rules 1980, O. 48 rr. 56, 57, 57(1), (3)

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For the plaintiff - R.J. Manecksh; M/s. Rhina Bhar & Associates

For the defendants - Balachandran Mahesan; M/s. Bala Mahesan & Co.

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*a***JUDGMENT****Edgar Joseph Jr. J:**

In the High Court at Penang the plaintiff had obtained judgment for RM15,000 being general damages for personal injuries and RM2,327.40 being special damages and interest on both those sums together with costs on the Subordinate Court scale.

b

When the solicitors for the plaintiff submitted the draft order to the solicitors for the defendants for approval, the latter deleted a number of items of costs claimed but only two of these now all for consideration; namely, item 22 being witness fee of RM1,000 paid to Mr. M. Shanmugam (Consultant Orthopaedic Surgeon) and item 26 being RM500 witness fee paid to Mr Tan Boon Hoo (Consultant Orthopaedic Surgeon).

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Before me, in Chambers, the question which arose for decision was whether the plaintiff was entitled to be fully reimbursed in respect of the two sums aforesaid or they only entitled to partial reimbursement and that too limited to the amounts prescribed by Appendix 2 to O. 48 r. 56 of the Subordinate Court Rules 1980. After hearing Counsel on both sides I decided this question in favour of the Defendants.

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I then granted the plaintiff's request for further argument in open Court where the matter was more fully argued.

To put matters in their proper perspective it is necessary to reproduce O. 48 r. 56 and 57 and Appendix 2.

They run as follows:

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56. Where on the hearing of any proceedings a person attends Court as a witness of fact, or as a witness to produce a document, or as a party to the proceedings, he may be allowed as compensation for loss of time such sum as the Court thinks reasonable, not exceeding the sum prescribed by Appendix 2 to this order for a person of the class to which the witness or party belongs.

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57(1) Where a person attends Court as an expert witness, he may be allowed a fee for attending the Court, and in addition, if allowed by the Court, a fee for qualifying to give evidence as such expert:

Provided that no fee as an expert witness may be allowed in respect of a person attending Court only to prove the correctness of a plan, drawing, chart, photograph or model.

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(2) The fee for attending Court shall be such sum as the Court thinks reasonable, not exceeding RM100 nor less than the sum prescribed by Appendix 2 to this Order as compensation for loss of time for a person of the class to which the expert witness belongs.

(3) The fee for qualifying to give evidence shall be such sum as the Court thinks reasonable, not exceeding RM200 :

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Provided that if in any particular case the Court is satisfied for special reasons that the fee for qualifying to give evidence ought not to be so limited, the fee shall be such sum as the Court directs

(4) The Court may, if it thinks allow the fee for qualifying to evidence, notwithstanding that the witness does not attend the trial.

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(5) Where a report in writing has been obtained from a witness who not entitled to a qualifying fee, the Court may if it thinks such a report reasonably necessary allow a fee exceeding not RM100.

Appendix 2.**Scale of Allowances**

Class of Persons	Maximum sum per day
(a) Professional persons, Government officers, directors and managers of corporate bodies, and persons in respect of a salary or income exceeding RM1,000 per month ...	50
(b) Persons whose salary or income exceeds RM250 but does not exceed RM1,000 per month	25
(c) Other persons ...	10

Note:

In granting an allowance to a witness regard should be had to:

- (i) his salary or actual or estimated income or circumstances.
- (ii) the time during which he was absent from his ordinary occupation while obliged to attend Court.

The background facts need to be briefly stated:

It is true that the solicitors for the plaintiff had served copies of the reports of the two specialists aforesaid upon the solicitors for the defendant in advance of the hearing commencing on 17 February 1987; Mr. Shanmugam's report having been served on 11 February 1987 and Mr. Tan's report on 13 February 1987 whereupon the solicitors for the defendant replied by letter dated 13 February 1987 saying that perhaps they might wish the plaintiff to be examined by a specialist of their choice a proposal with which the solicitors for the plaintiff readily agreed.

However, the solicitors for the defendant never pursued their intention to have the plaintiff examined by a specialist of their choice and it was not until the commencement of the trial that the solicitors for the defendant agreed to the two specialists' reports. This necessitated the plaintiff having to subpoena the two specialists to Court and they duly attended the hearing but the solicitors for the defendant having agreed to their reports, they were never called to testify.

In my view, the provisions pertinent to the circumstances of this case are those of O. 48 r. 57. It is clear that the two specialists concerned were expert witnesses whose attendance was required by the plaintiff to give evidence as to his residual disabilities which were the direct result of the injuries he had sustained in the collision. Therefore by r. 57(1) a fee was allowable in respect of their attendance in Court and, in addition, a fee for qualifying to give evidence as experts was also allowable because although they did not give evidence, r. 57(4) expressly provides that the Court may, if it thinks just, allow the fee for qualifying to give evidence, notwithstanding that the expert witness does not attend the trial. I would exercise my discretion in favour of the plaintiff in respect of both categories of fees.

As to the quantum of these fees, there appeared to be no dispute concerning the claim for fees in respect of the attendance in Court resulting in loss of time. However, the quantum of fees for qualifying to give evidence was fiercely disputed.

a Counsel for the plaintiff had contended that although generally by r. 57(3) the maximum permissible fee for qualifying to give evidence was fixed at RM200, the provisions of the proviso thereto empowered the Court, if satisfied that there were special reasons to do so, allow such a fee in excess of RM200. With this proposition I entirely agree.

b The question however is: Has the plaintiff satisfied the Court of the existence of special reasons to justify the application of the provisions of the proviso in his favour?

In considering this question I do not think that a Court should be bound by any rigid rule defining "special reasons". However, this much I think is clear and that is that the party seeking the exercise of the Court's discretion under the provisions of the proviso, must demonstrate that there are facts peculiar to the particular case which set it apart from others. Bearing in mind these general considerations I must now turn to consider the particular circumstances of the present case.

c Now, the calling of medical specialists in running down cases, even in the Subordinate Courts, is a matter of everyday occurrence. In what way could it be said that where such witnesses are called and a plaintiff obtains judgment against a defendant the Court would be justified in exercising its powers under the provisions of the proviso in favour of a plaintiff? I do not wish to lay down any hard and fast rule and the best approach would appear to be to decide each case according to its merits always keeping in mind that the onus is upon the plaintiff to demonstrate special reasons for the discretion to be exercised in his favour.

d I have not overlooked the submission of Counsel for the plaintiff that the calling of the two specialists was essential as a substantial part of the plaintiff's claim related to residual disability said to have been suffered by the plaintiff. It was also said that compensation on fault and the defendant having been found liable the only question was whether the specialists fees had been reasonably incurred. It was urged that the discretion of the Court should be exercised in favour of the plaintiff.

e At the end of the day, I still have to ask myself the question whether the plaintiff has demonstrated special reasons within the meaning of the provisions of the proviso. I regret I am unable to detect facts peculiar to the particular case which set it apart from the countless other running down cases where medical specialists are called. To hold otherwise would amount to indulging my human sympathies in disregard of my duty to do justice according to law. It would also be creating a dangerous precedent.

f The result therefore is that I would hold that plaintiff is entitled to partial reimbursement only of the expenses incurred by him in respect of the two specialists concerned, that is to say, RM100 fee for attending Court as compensation for loss of time, RM200 for qualifying to give evidence, in respect of each of them.

g By way of post script I would add that the correct procedure for a successful plaintiff to adopt if he desires the Court to exercise its discretion in his favour under the provisions of the proviso, is to ask for an order that those provisions be invoked and to support it with reasons sufficient to convince a legal mind that there are special reasons for the exercise of the discretion in his favour. The stage at which this should be done is as soon as judgment is pronounced in the trial Court, so that if the matter goes on appeal and issue of costs is reopened the High Court will have the advantage of the view of the Court below. Failure to do this would normally result in the High Court refusing to entertain arguments on the question concerned.

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i Also found at [1992] 2 CLJ 1012